United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,093

ERNEST L. THOMAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the
District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a jury verdict of guilty rendered after a trial before the Honorable Henry A. Schweinhaut, on a charge of rape. The judgment of guilty was entered on October 16, 1964, and the Notice of Appeal was filed on December 9, 1964. This Appeal is taken pursuant to 28 U.S.C. §1291.

STATEMENT OF THE CASE

Two Defendants, Ernest L. Thomas and Joseph W. Williams, were charged in an indictment containing two counts of rape against each of them. The alleged rape supposedly occurred on or about the 7th day of May, 1964, within the District of Columbia and against a female named Betty J. Anderson. At the conclusion of the trial, the Trial Judge instructed the jury that they were to consider only Count Two of the indictment, on the theory that, by dismissing Count One the Trial Judge was directing a verdict of "not guilty against the Defendant Joseph W. Williams. At the conclusion of the Judge's instructions, a unaminous verdict of guilty against Defendant Ernest L. Thomas was rendered by the jury. From this finding and judgment, the within Appeal was taken.

STATEMENTS OF POINTS RELIED UPON

I. The Court erred in instructing the jury:

A. That the Defendant Joseph W. Williams was "out of the case as a Defendant,"

B. That the case will be "submitted to you on the first Count of the indictment only, since the judgment of acquittal has been entered as to Williams on the second Count,"

C. That the first Count of the indictment was the only Count mentioning two people.

D. That the Appellant and some other person were alleged to have aided and abetted each other in having carnal knowledge of the complaining witness.

II. The Court erred in failing to instruct on the law in the District of Columbia on aiding and abetting a felony.

III. The Court erred in failing to instruct the jury on the law in the District of Columbia on the requirements of corroboration of identification.

IV. The Court, in its elimination of Count Two, so confused the jury that no legal verdict could be returned.

V. The Court should have dismissed the action and directed a verdict in favor of the Defendant Ernest L. Thomas, and its failure so to do was error since:

A. The Government did not prove a case of rape, "beyond a reasonable doubt."

B. The testimony of the prosecuting witness was plainly incredible and inconsistent,

C. Upon the evidence, it was clear that "a reasonable mind must necessarily have had a reasonable doubt as to the Defendant's guilt."

VI. For such other and further bases as may be set forth in the within Brief or in oral argument.

ARGUMENT

I. The instructions of the Trial Judge were clearly erroneous and misleading, and could only lead to a speculative and uncertain verdict.

A. The indictment of the Appellant Ernest L. Thomas (and the original Co-defendant, Joseph Williams) was in two counts. It read as follows:

> "On or about May 7, 1964, within the District of Columbia Ernest L. Thomas and Joseph W. Williams had carnal knowledge of a female named Betty J. Anderson, forcibly and against her will."
>
> SECOND COUNT:
>
> "On or about May 7, 1964, within the District of Columbia, Joseph W. Williams and Ernest L. Thomas had carnal knowledge of a female named Betty J. Anderson, forcibly and against her will. The offense alleged in this Count is a different offense then that alleged in Count One of this indictment."

In the opening statement of the prosecution, the United States Attorney observed that:

> "...in this case the Defendants, Ernest Thomas and Joseph Williams, are charged with rape, <u>two counts of rape against each of them....</u>"

At the conclusion of the prosecution's portion of the case, the Court indicated that it had strong doubts as to the case against Co-defendant Williams, and that a judgment of acquittal as to him would be entered. The Judge, in a bench conference, indicated:

> "I will resolve it the safe way. I will dismiss the second Count of the indictment. I will leave the first count in, and

> I will have to explain to the jury that it [the indictment] charges two people with aiding and abetting each other, that each had carnal knowledge. I have taken Williams out of the case, because, as a matter of law, the evidence is insufficient to keep him in. I think that is the only safe way to handle that."

In his instructions to the jury at the conclusion of the case, the Trial Judge observed:

> "Now, during the course, or rather at the conclusion of the evidence adduced on behalf of the prosecution, I held, after hearing arguments of counsel, that as a matter of law -- and I will not go into detail with you because it is unnecessary to do so -- but strictly as a matter of law, the evidence against the defendant, Joseph W. Williams, was insufficient to sustain a conviction of him. And he, therefore, is out of the case as a defendant.
>
> By so doing, by taking such action, you are not to understand that I am attempting to convey any impression of the Court's feeling as to the guilt or innocence of the defendant, Ernest L. Thomas, who remains in the case. There is no expression of opinion implicit in my ruling as to the other defendant at all, and I want you to be very careful not to let your thinking about the case when it comes to you be influenced by my action which, as I say, is strictly one of law, with respect to the other defendant Williams.
>
> Therefore, when the case is submitted to you, it will be submitted to you on the first count of the indictment only, since a judgment of acquittal has been entered as to Williams on the second count.
>
> The first count, as I say, charges both Thomas and Williams with having had carnal knowledge of this girl forcibly and against her will. It is only that count, which you will notice does mention two people, Thomas, the defendant, and Williams who is no longer a defendant. You may or may not believe or be satisfied beyond a reasonable doubt that Williams participated as an aider and abettor, or that someone else did if it wasn't him, in the rape of this girl, if a rape occurred as she alleges it did.

But, in any case, Williams is not a defendant in the case, and you will not be called upon to render a verdict for or against him."

Finally, the Judge had the following to say to the jury:

"And I will not send in the indictment to you because there is no complexity in the language. This defendant and some other person are alleged to have aided and abetted each other in having carnally known this complaining witness, Betty Anderson, by force and against her will."

It is plain that the Trial Judge misread the indictment. The indictment was in two counts, each of the counts charges each and both of the Defendants with having had carnal knowledge of the complaining witness. By dismissing only one count of the indictment, the Trial Judge clearly did not remove the Defendant Williams from the case, since the Defendant Williams was still charged as a participant in the second Count of the indictment. Thus, when the members of the jury were asked to consider a verdict they could not intelligently and properly do so because they were left to speculate on:

1. Whether with only one Count left in the indictment they were determining the Defendant Thomas' guilt as to the alleged first round of intercourse with the complaining witness or the second alleged round of intercourse, or

2. Whether they were finding the Defendant, Thomas guilty of having had carnal knowledge of the prosecuting witness on two occasions by force and against her will, or

3. Whether the Defendant Thomas was guilty only of "aiding and abetting'an unknown person (as the Court put it "some other person") in having such carnal knowledge or was guilty of being the principal, himself.

4. Whether one or two persons were involved in the crime.

5. Whether the prosecuting Attorney was misleading them or incorrect when he told the jury there were two counts of rape against each of the Defendants, and

6. Whether they still had some obligation to be satisfied beyond a reasonable doubt that Williams participated as an aider and abettor, or someone else did.

Certainly, this Defendant has been prejudiced by the erroneous instruction and erroneous manner of handling the "directed verdict," against Williams.

In suggesting to this Court that the instructions of the Trial Judge could result in no reasonable verdict, Counsel is not unmindful of the findings of this Court in the Franklin case (Franklin v. United States, 117 U.S. App. D.C. 331, 1964; 330 Fed 2d 205). Much of what was said in that case on the question of the framing of indictments is applicable here. While the division of the indictment in the instant case into two Counts, might lead the jury to understand that more then one rape was charged, and while there was no request by the Defendant for a Bill of Particulars requiring the Government to disclose what it intended to prove under the charge, and

while the indictment was not attacked in limine, it certainly is true that the Court failed to adequately advise the jury as to the charge against this Defendant. The Court in its final words to the jury told them that the Defendant Thomas and some other person were alleged to have aided and abetted each other in having carnally known the complaining witness, by force and against her will. The jury was not advised:

1. What the over-all offense charged in the indictment was.

2. What the elements of a joint offense would be.

3. The participation which would be required for a conviction of one of the joint offenders, with the other eliminated from the case.

4. What is meant by "aiding and abetting," in the commission of the offense.

5. That in the commission of the offense if one were an "aider and abettor" he could be found guilty as a principal.

Admitting arguendo that, on the Government's evidence, Thomas might under proper instructions have been chargeable as an "aider and abettor" and therefore as a principal, the instructions were so confusing that the jury might as easily have reached its verdict of guilty concluding that the Judge felt the prosecution's case showed that Thomas was not the person that committed the rape (there being some other person whom he aided and abetted) and that he was only being found guilty of aiding and abetting a rape. This certainly was not the gravamen of the charges in the indictment.

The Court, likewise, failed to advise the jury as to the distinctions that were necessary in order to convict the Defendant Thomas as a principal in the crime and/or as an accessory thereto. While Counsel is mindful of the statutory provisions in Section 22 - 105, providing that:

> "In prosecutions for any criminal offense all persons advising, inciting, or conniving, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact, the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be." (March 3, 1901, 31 Stat, 1337, Ch. 854, Section 908)

it has been decided, that pursuant to this statutory provision, a Defendant is entitled to have the Court instruct the jury fully and correctly on the statutory provision that all who aid or abet in the commission of a crime are chargeable as principals.

> Cooper and Williams v. United States, (D.C. Mun App 1956, 123 Atl. 2d 918)

Thus, in the instant case when the Trial Judge told the jury that "... this Defendant and some other person are alleged to have aided and abetted each other in carnally knowing this complaining witness..." he should have instructed the jury completely and clearly as to whether Defendant Thomas was being charged as an accessory or as a principal. Even assuming that Thomas could have received the same conviction in either capacity, the Court indicated to the jury only that he was being charged as an "aider and abettor." While this Court may not be required to reach this question, it has been held that a person indicted as a principal cannot be

convicted as an accessory, since an accessory must still be indicted as such.

14 Ann. Cas. 311

See also Cooper v. United States, 123 Atl 2d 918 (1958), (D.C. Mun App)

See also Landry v. United States, 81 U.S. App D.C. 127 (1946)

II. The identification of the Appellant Thomas was not adequately corroborated, and the Trial Court failed to charge the jury properly in this regard.

A. Failure to say in plain words that if the circumstances of the identification were not convincing, the jury should acquit, is error.

McKenzie, v. United States, 75 U.S. App. D.C. 270, 273; 126 Fed 2d, 533, 536 (1942)

As pointed out in the McKenzie case, it was the duty of the Trial Judge to point out the necessity for substantial corroboration of identification. Even though it is possible for a conviction for the crime of rape to be sustained upon the testimony of the complaining witness alone, the Courts of the District of Columbia have held in such instances that the circumstances surrounding the parties at the time were such as to point to the probable guilt of the accused, or, at least, corroborate indirectly the testimony of the prosecutrix.

See Franklin v. United States, supra, and cases cited there.

Although Trial Counsel for the Appellant did not except to the Court's charge on corroboration of identity, the issue was preserved by a

later motion for a judgment of acquittal, at the close of the Government's case, and after the verdict of the jury.

For these reasons, if for no other, the verdict of the jury must be set aside.

III. On all of the evidence, the Government did not make out a case of rape. It is the Appellant's contention that this is a question of law.

Since the earliest days of common law, the Courts have scrutinized cases of rape with special caution. Aside from the fact that the crime carries the possible death sentence, it is a crime difficult to prove and more difficult to defend against. For this reason, the proof of the Government should be scrutinized with the utmost care.

A. In the instant case, the complaining witness was a seventeen year old girl who had borne one child, and was pregnant with another. Both of the pregnancies were extra-maritally induced. The testimony showed that the complaining witness was not physically incapacitated in any way and not an immature child. The Doctor testified that she had a "marital introitus," indicating that she had had intercourse more then several times. The physician who testified indicated that her vaginal opening was one that would be seen in instances of a married woman. The complaining witness did not run away or even attempt to run away when she was accosted. The testimony indicated that there was no sign whatsoever of any bruising or tenderness on her body. The Doctor testified that at the time of her examination the complaining witness even appeared to be "calm." There is no testimony

that the place where the complaining witness was accosted was other then a usually lighted public street. The Complainant testified about walking with the Defendants across the street to a place where "the people were," and there is no testimony that during this "walk" the complainant offered any resistance. While the complaining witness talks about having "screamed," there are severe conflicts in her testimony as to where she did the screaming.

In the preliminary hearing, she testified that it was the "boy in the stocking cap," who told her "if I screamed he was going to kill me." In her testimony during the course of trial, she indicated that it was the boy without the stocking cap who told her that she would be killed if there was further screaming.

The complaining witness testified that she walked approximately a block and one-half with one of the two Defendants alone, while the other had left to see if "the coast was clear." She is not clear in her testimony on whether the Defendant with whom she walked was the one who threatened her. If this was not the Defendant who threstened her life, the essential element of fear was eliminated, or at least unexplained.

The complaining witness, after the rape allegedly occurred, testified that as "I was getting ready to leave ..." one of the Defendants came up to her and said "Well, I'm not going to say anything about this and I don't want you to say anything to anybody else." I mean, "If you don't tell, I won't tell." This is not the language of a threat, nor is it calculated to instill fear or nurture fear already instilled. "Getting ready to leave" implies leisurely preparations or repair of her appearance. It does not indicate

an atmosphere of fear.

The complaining witness testified that "when I got onto the street where the light was," the boy in the stocking cap walked over to me and asked me did I want him to brush my skirt off. I told him no. to leave me alone." This type of conversation may connote the conclusion of a not-too-pleasant encounter, but does not suggest the aftermath of a rape. She also testified that "he told me did I want his telephone number and did I want him to walk me home. I told him no, just leave me alone." Certainly this is not the testimony of a girl who had been in fear for her life and safety, and has been sexually assaulted four times. Obviously she was gently treated and responded gently if not in a friendly way to her treatment.

At the time that she had the conversation with one of the boys about getting his telephone number or having her skirt brushed off, the other so-called assailant was "coming out of the place from where they took me, out the vacant lot." Again the suggestion that the encounter had not quite been completed and the time for parting not yet arrived. There was no force being used upon her, no effort being made to detain her and no repetition of threats. No effort was made by her to seek help and aid from anybody, no attempt to flee, no attempt to scream, and no attempt to go home. Similarily, her so-called assailants were in no hurry to leave the scene -- seemingly because they had no urgency to seek anonymity.

The complaining witness testified that she even noticed the physical appearance of one of the men "on Pond Street," <u>before</u> she was

accosted and before she was taken into the vacant lot. She could tell at this point that he was walking, in a "bow-legged and pigeon-toed" fashion. She confirmed that this was the same manner of walking after the alleged rape. In her running from her friend's home to her own before the accosting, when did she have the opportunity to observe his manner of walking?

The complaining witness saw the Defendants walking away, and apparently stayed at the point of parting long enough to see them for almost a block after they had left her.

The complaining witness rests her claim of fear on the simple statement by one of the assailants that, "if she screamed she would be killed." There was no testimony as to any weapon, there was no testimony as to any display of physical force, there was no testimony of any "roughness." The cases in the District of Columbia are quite clear that the "fear" to be sufficient for the purpose of rape, must be based upon something of sustance; and the fear must be of death or severe and possible bodily harm.

Farrar v. United States, 275 Fed 2d, 868 (1959)

As pointed out by the Court in the Farrar case, a complaining witness cannot simply say, "I was scared," and thus transform an apparent consent into an illegal non-consent which makes the man's act a capital offense. She must have a reasonable apprehension of something real; her fear must not be insubstantial.

In the case at bar, as in the Farrar case, there was an approved acquiescence on the complaining witness' part. While she testifies that one

of the assailants pulled down her panties, her matter-of-fact description of the intercourse leads more readily to the conclusion of consent. She testifies during the course of the trial that "he got on me, and he pulled his zipper down and he took out his penis and placed it in my vagina." Later in talking about her second assault, she says, "the boy with the stocking cap, he did the same as Monk did, pulled down his zipper and pulled out his penis and put it in my vagina." Although the law of rape may be liberal enough to permit a jury some decree of speculation as to what may have frightened a girl in such a case, the record in the Court below does not indicate any reason for fear.

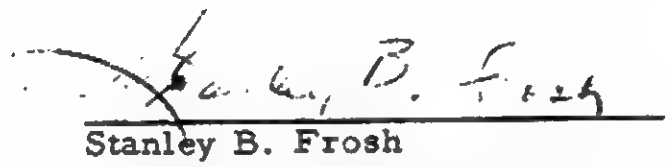
Finally, by the complaining witness' own testimony, more then an inconsiderable amount of time elapsed from the time that the alleged rape occurred and the time she reported the rape to the police. She testified that at 11:00 she left her house, took three minutes or four minutes to get to her girl friend's house where she stayed long enough to pick up a blouse and shorts. She walked, immediately, from there to the point where the accosting took place (no more then a block.) At the preliminary hearing the complaining witness specified that the attack occurred at 11:15 p.m. The complaint to the police was received by a radiogram at 1:22 a.m. This is approximately two hours after the time that the offense was committed. A complaint of this nature would logically have been lodged, if it were true, immediately after the complaining witness was free to reach help. Since the prosecution's witness testified to her

calmness at her physical examination, there is no suggestion of agitation, fear, hysteria or anything other than calm meditation after the supposed assault, resulting in a change of mind on the quality of the encounter.

CONCLUSION

For all of the above reasons it is respectfully submitted that the cause should be returned to the Trial Court with instructions to enter a Directed Verdict of Acquittal.

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals

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ERNEST L. THOMAS, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
DAVID EPSTEIN,
JOHN R. KRAMER,
Assistant United States Attorneys.

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Were the trial court's instructions on who was being charged with what and on the corroboration requirement sufficient and was there sufficient evidence corroborating appellant's role in the crime and proving the reasonableness of complainant's fear of suffering severe bodily harm or being killed were she to resist to the utmost?

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TABLE OF CASES

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* Cases chiefly relied upon are marked by asterisk.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted, tried by jury, convicted, and sentenced, to imprisonment for a period of four to twelve years on one count of rape in violation of 22 D.C.C. § 2801. A second count also charging him with rape was dismissed by the trial court (Tr. 219).

At trial, the complainant, Betty Anderson, who was sixteen at the time in question, testified that shortly after eleven p.m. on May 7, 1964, as she was walking down Pond Street, N.E., in the District, to her home at 1577 45th Street, N.E., a boy with a stocking cap covering his

face walked up to her and asked her to give him some "cock" (Tr. 6-10, 48). She started to run, and he tried to hold her arm. At that point, appellant, whose face was uncovered and who was wearing brown pants and either a beige or light brown sweater, came out from a nearby courtyard and helped the stocking-capped boy grab her. (Tr. 10-14, 27.) She tried to fight them, but, by twisting her arm, they managed to take her a block and half across Pond Street through an alley and onto a vacant lot which had a creek running through it[1] (Tr. 13, 48, 63). She screamed as they took her along, trying to break away. Appellant whom she had seen before at the Kenilworth Recreation Center and knew by the nickname of Monk, warned her that if she hollered again he would kill her (Tr. 13-15, 27-28, 48-49, 63-65).

When they arrived at the lot, appellant threw her to the ground, pulled down her panties, got on top of her, and had intercourse with her (Tr. 15-16, 49). When he had finished, the boy in the stocking cap took his turn (Tr. 15-16). Complainant kept attempting to get up, but she was unsuccessful (Tr. 16). Still, when appellant got on top of her a second time, and had intercourse once more, she wiggled so much that appellant had to direct the other fellow to hold her legs (Tr. 16-18). She kept trying to hit appellant with her fists (Tr. 19). She was too tired to resist when the boy with the cap got on again (Tr. 18).

When it was all over, appellant said he wouldn't tell, if she didn't (Tr. 20). Appellant and the other boy walked away toward Kenilworth Avenue (Tr. 22). Complainant, who was scared and crying, went right away to her girl friend, Marian Alexander's house, next door to her own, and told Marian what had happened, about how Monk had raped her (Tr. 23-25, 55). Marian took her home, and from there she went to D. C. General Hospital (Tr. 26, 30).

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[1] According to the police officers' version of her story, this lot was located in the rear of 4415 Douglas Street, N.E., in the District (Tr. 97, 121).

Marian Alexander described seeing complainant at her door, crying and dirty, with her skirt half off and grass in her hair, around midnight or thereafter (Tr. 86, 89). Complainant told Marian all about the rape, including reference to Monk's threat to kill her and her instant recognition of Monk (Tr. 87-88, 92-93). Miss Alexander confirmed the fact that appellant was known as Monk, as did one of the policemen who took the stand and Mrs. Thornton (Tr. 95, 110, 149).

Dr. Joseph Calderone of D. C. General Hospital testified to the results of his examination of complainant at 3:30 a.m. on the 8th of May. He found her calm, with dishevelled clothing and grass-stained underpants. Her vagina exhibited signs of marital introitus, but none of trauma. There was a fair amount of mucous secretion in her vagina, which was compatible with recent intercourse and spermatozoa as well, which was consistent with intercourse up to five days before. (Tr. 37-42.)

Private Joseph Cirigleano and Ronald Welling of the Fourteenth Precinct testified that they talked to the complainant at about 1:20 or 1:25 on the 8th. She named Monk as one of her assailants (Tr. 97-98, 118, 121). They saw appellant at Kenilworth Avenue and Douglas Street about 2:35 that morning (Tr. 98-99, 122-123). Private William Williams of the same precinct found appellant in Bar 20 in the 1500 block of Kenilworth Avenue about three blocks from the lot in which the rape occurred at approximately 2:20 a.m. (Tr. 146-151). None of the officers could recall what appellant was wearing (Tr. 99, 148).

Mrs. Alice Thornton of 1559 - 45th Street, N.E., remembered talking to appellant at her house a little before eleven p.m. on the day in question when appellant came, with another boy whom she did not recognize, to look for her son (Tr. 110-112). Appellant left by going through the alley, out of the court in which she lived (Tr. 112).

After appellant's counsel successfully moved for an acquittal on behalf of appellant's co-defendant, Joseph

Williams, and for appellant's acquittal on count two, appellant presented witnesses, including himself, who generally testified to his presence at his home during the crucial hour (Tr. 127, 129, 156-256). None of that testimony is material to the question presented here. See *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 334, 330 F.2d 205, 208 (1964); *Cephus* v. *United States*, 117 U.S. App. D.C. 15, 17-20, 324 F.2d 893, 895-898 (1963), *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 345-346, 218 F.2d 39, 41-42 (1954).

SUMMARY OF ARGUMENT

The court's charge was a clear and explicit command to the jury that it must find that the Government proved beyond a reasonable doubt that appellant had sexual intercourse with complainant on the date in question, that complainant submitted to this because of fear for her life induced by appellant's threats and/or use of force, and that appellant's identity as her assailant was corroborated by circumstantial evidence, as well as revealed by her own testimony.

The corroboration and fear evidence were amply supplied by complainant's own testimony, her spontaneous declarations to her girl friend and the police, her prior knowledge of appellant and his nickname, and testimony placing appellant in the immediate vicinity of the situs of the crime both right before it occurred and slightly more than two hours after it took place.

ARGUMENT

The instructions and the evidence were sufficient [2]

(Tr. 10-20, 27-28, 64-65, 87-88, 92-93, 95, 97-98, 110, 118, 121, 146-151, 262-267, 271-273)

Appellant contends that the jury was left hopelessly confused by the trial court's charge as to the nature of the verdict they should return—whether they were to consider the guilt or innocence of co-defendant Williams as well as that of appellant, whether they were to determine appellant's guilt or innocence of one or two acts of intercourse or of a unitary course of action involving rape, whether they were to assess appellant's guilt or innocence in terms of direct participation or aiding and abetting. If the instructions are considered as a whole in accordance with the uniform rule of this Court, see *Robert* v. *United States*, 109 U.S. App. D.C. 75, 77, 284 F.2d 209, 211 (1960), *cert. denied*, 368 U.S. 863 (1961); *Askins* v. *United States*, 97 U.S. App. D.C. 407, 231 F.2d 741, *cert. denied*, 351 U.S. 989 (1956); *Kinard* v. *United States*, 69 App. D.C. 322, 101 F.2d 246 (1938), it becomes patent that it is only appellant who was confused, not the jury.[3] The trial court clearly focussed the

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[2] All of appellant's various "statements of points relied upon," with the exception of VI, may be compressed into challenges to the sufficiency of the instructions and of the evidence. Statement VI—"for such other and further bases as may be set forth in the within Brief or in oral argument"—constitutes a flouting of Rule 17(b)(1) and (7) and Rule 17(g), General Rules of the United States Court of Appeals for the District of Columbia Circuit. This Court has previously expressed its disapproval of such a "void-for-vagueness" presentation of points of error. *May* v. *United States*, 84 U.S. App. D.C. 233, 238, 175 F.2d 994, 999, *cert. denied*, 338 U.S. 830 (1949).

[3] "The indictment in this case is in two counts. That is to say, there are two separate charges.

"The first count reads as follows:

'That on or about May 7, 1964, within the District of Columbia, Ernest L. Thomas and Joseph W. Williams had carnal

jury's attention on finding, as a predicate for a verdict of guilty, that the Government had proven to its satisfaction beyond a reasonable doubt not only that on May

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knowledge of a female named Betty J. Anderson, forcibly and against her will.'

"And the second count of the indictment charges, as follows:

'That on or about May 7, 1964, within the District of Columbia, Joseph W. Williams and Ernest L. Thomas had carnal knowledge of a female named Betty J. Anderson, forcibly and against her will.'

"The offense alleged in this count is a different offense than that alleged in count one of the indictment.

"Now, during the course, or rather at the conclusion of the evidence adduced on behalf of the prosecution, I held, after hearing arguments of counsel, that as a matter of law—and I will not go into detail with you because it is unnecessary to do so—but strictly as a matter of law, the evidence against the defendent, Joseph W. Williams, was insufficient to sustain a conviction of him. And he, therefore, is out of the case as a defendant.

"By so doing, by taking such action, you are not to understand that I am attempting to convey any impression of the Court's feeling as to the guilt or innocence of the defendant, Ernest L. Thomas, who remains in the case. There is no expression of opinion implicit in my ruling as to the other defendant at all, and I want you to be very careful not to let your thinking about the case when it comes to you be influenced by my action which, as I say, is strictly one of law, with respect to the other defendant Williams.

"Therefore, when the case is submitted to you, it will be submitted to you on the first count of the indictment only, since a judgment of acquittal has been entered as to Williams on the second count.

"The first count, as I say, charges both Thomas and Williams with having had carnal knowledge of this girl forcibly and against her will. It is only that count, which you will notice does mention two people, Thomas, the defendant, and Williams who is no longer a defendant. You may or may not believe or be satisfied beyond a reasonable doubt that Williams participated as an aider and abettor, or that someone else did if it wasn't him, in the rape of this girl, if a rape occurred as she alleges it did.

"But, in any case, Williams is not a defendant in the case, and you will not be called upon to render a verdict for or against him." (Tr. 262-264)

* * * *

"As I have told you, the charge in this case is rape, which consists of sexual intercourse, unlawful carnal knowledge of a woman, by force and against her will. The force may be actual or con-

7, 1964, appellant had had sexual intercourse with Betty Anderson against her will overcome either by threats putting her in fear of bodily harm or death or by threats combined with physical force, but also that the complainant's testimony as to the fact of the rape and the identity of her assailant was corroborated by credible circumstantial evidence. Such a charge is unimpeachable under any of the decisions of this Court in rape cases.

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structive, as where acquiescence on the part of the woman is secured by fear or intimidation.

"The act of carnal knowledge or rape—and that means carnal knowledge—is held to have occurred where the slightest penetration takes place.

"Consent is not shown when the evidence discloses that resistance is overcome by threats which put the woman in fear of bodily harm or in fear of death, or by these combined with some degree of physical force. What is sufficient physical force to overcome the will of a woman is a fact for you to determine in every case of this nature.

"Now, it is the law further that where a charge of rape depends primarily upon the testimony of the alleged victim alone, there should be some corroboration of her testimony as to the fact of the rape and as to the identity of the person alleged to have committed it, in the sense that there must be circumstances in the proof which tend to support the story of the complaining witness. This does not mean that eyewitnesses or so-called direct evidence must be produced by the prosecution from other sources. It is sufficient if, on the whole of the evidence, circumstances are revealed which support indirectly or lend credence to the testimony of the prosecutrix, the girl. There is no yardstick by which such circumstantial evidence can be measured. You find the corroboration or not in the same manner as you decide any other fact required to be established in any case.

"In other words, you take into account the same considerations that I have heretofore suggested to you for the evaluation of the evidence generally.

"Now your verdict, ladies and gentlemen, must be unanimous, as I am sure by now you all know.

"And I will not send in the indictment to you because there is no complexity in the language. This defendant and some other person are alleged to have aided and abetted each other in having carnally known this complaining witness, Betty Anderson, by force and against her will. Your verdict will be either 'guilty' or 'not guilty.'" (Tr. 271-273)

The court also gave a strong instruction on the nature of reasonable doubt (Tr. 265-267).

See *Franklin*, *supra*, 117 U.S. App. D.C. at 334, 330 F.2d at 208 (court refused to charge jury that corroboration of identity was required); *Farrar* v. *United States*, 107 U.S. App. D.C. 204, 212, 275 F.2d 868, 876 (1960) (elaborating consent standard and quality of fear); *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 16, 135 F.2d 633, 635 (1942), *cert. denied*, 318 U.S. 776 (1943) (the fear standard in relation to threats); *McKenzie* v. *United States*, 75 U.S. App. D.C. 270, 273, 126 F.2d 533, 536 (1942) (trial court reversed for failure to instruct jury in terms of conviction of appellant's guilt, including his identity as complainant's attacker, beyond a reasonable doubt rather than, as the charge read, in terms of less than positive certainty or disbelief in defendant's alibi).[4]

Nor was the Government's case-in-chief evidence of rape, including the corroboration of complainant's identification of appellant and the proof of complainant's fear negating consent, insufficient as appellant claims, when viewed, as it must be, in the manner most favorable to the Government. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 331, 147 F.2d 28, 30, *cert. denied*, 324 U.S. 875 (1945).

Complainant made a positive, convincing identification of appellant that was not impeached on cross-examination (Tr. 13-14, 27). Such an identification in itself may be enough without need for any further corroboration, based as it was upon complainant's adequate opportunity to observe appellant, whose face was uncovered at all times, during the course of his taking her a block and a half to the lot, the two acts of intercourse, and his conversation with her thereafter (Tr. 10-20). *Franklin*, *supra*, 117 U.S. App. D.C. at 335, 330 F.2d at 209; *Walker* v. *United States*, 96 U.S. App. D.C. 148, 152-154,

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[4] At no time did appellant comply with Rule 30, Fed. R. Crim. P., in preserving instructional error for appellate review as is necessary in order to challenge these instructions. See, *e.g.*, *Franklin*, *supra*.

223 F.2d 613, 617-619 (1955). In addition, complainant had seen appellant before and knew his actual nickname (Tr. 14-15, 27-28, 64-65, 95, 110, 149), Mrs. Thornton had seen appellant with another boy in the immediate vicinity of the place where complainant was accosted shortly before the offense charged took place (Tr. 7, 10—complainant grabbed by appellant shortly after eleven p.m. on Pond Street en route to 45th Street, Tr. 110-112—appellant seen at 1559 45th Street a little before eleven p.m.), and a police officer placed appellant within three blocks of the rape site at 2:20 a.m. (Tr. 146-151). Even more significant in supplying the requisite corroboration was complainant's spontaneous declaration to her girl friend, Marian Alexander, naming Monk as her attacker and her similar statements to the police (Tr. 87-88, 92-93, 97-98, 118, 121). The record in the instant case contains more identity corroboration evidence than is revealed in any of the cases in which this Court has previously found the corroboration requirement to have been satisfied. Compare *Walker*, *supra* (positive identification alone); *Ewing*, *supra* (appellant, previously known to complainant, spent night of attack in same building as complainant).

The credibility and reasonableness of complainant's fear of being killed, as appellant had threatened, were she to cry out for help to avoid being molested, is obvious and unchallengeable in light of the time, the place, the contrast between two men and one girl, and the force actually employed by the attackers to subdue complainant. See generally *Farrar*, *supra*.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
DAVID EPSTEIN,
JOHN R. KRAMER,
Assistant United States Attorneys.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,093

ERNEST L. THOMAS)
)
Appellant)
)
v.)
)
UNITED STATES OF AMERICA)
)
Appellee)

PETITION FOR REHEARING EN BANC

Comes now the Appellant, by his counsel appointed by this Court, Stanley B. Frosh, and moves this Honorable Court for a rehearing in the above captioned cause, before this Honorable Court sitting En Banc, and for reasons therefor states as follows:

Judgment of affirmance of the Judgment of the United States District Court for the District of Columbia was entered by this Honorable Court on May 18, 1965, Per Curiam without any opinion. The Appellant believes that he has and had a meritorious case, which requires the attention of this Court En Banc.

The Appellant relies upon all of the Points set forth in his Brief on Appeal, incorporating them by reference, herein.

WHEREFORE, it is respectfully requested that a rehearing

in the within cause be granted.

Respectfully submitted,

Stanley B. Frosh

Stanley B. Frosh
Attorney for Appellant

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition for a Rehearing En Banc has been prepared, executed and filed in good faith, and not as a delaying tactic nor as an importunity on this Honorable Court.

Stanley B. Frosh

Stanley B. Frosh

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition, was mailed, postage prepaid, this 28 day of July, 1965, to David C. Acheson, Esq., United States Attorney, Frank Q. Nebeker, Esq., David Epstein, Esq., and John R. Kramer, Esq., Assistant United States Attorneys, United States Courthouse, John Marshall Place and Constitution Avenue, N.W., Washington, D.C., Attorneys for the Appellee.

Stanley B. Frosh

Stanley B. Frosh

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,094

JOSEPH L. HAMILTON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

9811

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Elizabeth R. Young
715 Southern Building
Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

No. 19,094

QUESTIONS PRESENTED

1. Was the statement by Government counsel in the presence of the jury during the recross-examination of the complaining witness that the defendant is guilty of the crimes with which he is charged so improper and prejudicial as to jeopardize the defendant's right to a fair trial.

2. Was the defendant's right to a fair trial jeopardized by his lack of a transcript of the Government's case presented at his first trial on the same charges that are the subject matter of this appeal at which first trial the jury was unable to agree on a verdict.

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TABLE OF CASES

STATUTES

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,094

JOSEPH L. HAMILTON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment and commitment of the United States District Court for the District of Columbia in which appellant Joseph L. Hamilton was convicted and sentenced to a term of imprisonment on charges of robbery (Sec. 22-2901 D.C. Code 1961 ed.) and assault with a dangerous weapon (Sec. 22-502 D.C. Code 1961 ed.) R. 11).

The District Court had jurisdiction under Sec. 11-306 D.C. Code 1961 Edition.

This Court has jurisdiction under 28 U.S. Code 1291 (1958).

STATEMENT OF THE CASE

Defendant was indicted by a grand jury for the District of Columbia on April 20, 1964, on charges of robbery and assault with a dangerous weapon.

The offenses allegedly occurred on March 17, 1964.

Defendant was arraigned on April 24, 1964.

Counsel was appointed by the District Court to represent defendant.

Trial by jury had on September 29, 1964, ended in a mistrial when the jury was unable to agree on a verdict.

The second trial by jury had on October 29, 1964-November 13, 1964 resulted in a verdict of guilty and defendant was sentenced to imprisonment for from two to six years on the robbery charge and from two to six years on the assault charge the two sentences to run concurrently.

The District Court on November 20, 1964, granted defendant's application to proceed on appeal without prepayment of costs and also directed that the transcript of proceedings in the District Court trial at which defendant was convicted be prepared at the expense of the United States.

This Court granted defendant's motion to have the transcript of the Government's case at the first trial prepared at the expense of the United States.

THE TRIAL

The robbery and assault allegedly occurred on March 17, 1964, at about 11:30 o'clock p.m. at or near the corner

of Georgia Avenue and Howard Place (Tr. 13). The complaining witness Mr. Smitherman was waiting for a bus having come from Howard University where he was studying for a doctor's degree in chemistry under a grant from the National Aeronautical and Space Administration (Tr. 13).

He noticed four young Negroes walking toward him on the opposite side of Georgia Avenue. They passed by him while conversing with each other then two of them turned back crossed the street and came up to him; one of them came up sort of from behind and put a knife to his chest and asked him to pull off his jacket. The other man was standing behind him.

The other two men who had remained on the other side of the street had crossed over when Smitherman was told to take his coat off and they saw his watch and took it off his arm and one went into his pocket to take his wallet and one then went all through his pockets. This all took two or three minutes. (Tr. 16,17).

When the man with the knife came up Smitherman was not facing him; the man had to reach over Smitherman's shoulder to put the knife to Smitherman's chest. (Tr. 25).

While the men were standing around Smitherman a police cruiser was seen coming to the corner; Smitherman indicated to its occupants that he was being robbed. The cruiser came up and stopped. Two policemen got out. Three of the men ran and the fourth man who was standing with his

back to the street was taken into custody by the police; the police searched him; they put the man and Smitherman in the police cruiser; they got in and drove around the area. (Tr. 18,19).

After putting Smitherman and the defendant in the police car the police searched the area in the car for the other three men and for the knife. The knife was not found. (Tr. 54).

The witness Smitherman was excused after his testimony in chief. (Tr. 46). The other government witness Officer Waybrite identified Smitherman as having been the gentleman who preceded Waybrite on the witness stand. (Tr. 50).

The knife was never found. (Tr. 51).

Neither the knife nor anything Smitherman had described as being his property was found on the defendant. (Tr. 59).

In the course of recross-examination of the complaining witness Smitherman counsel for defendant asked him - "You mentioned you knew his (defendant's) face. Do you recall anything about his face that was different from the face of the other three men?"

And counsel for the Government interrupting before the question could be answered stated -

"Your Honor, it is immaterial whether it differs from the other three, even if he were one of the other three, he is guilty of the crimes charged here. I don't think the

difference between one of the other three - -." To which the Court replied "Oh, well, he can ask the questions. Go ahead." (Tr. 45,46).

At the conclusion of the government's case defendant moved for a judgment of acquittal. The motion was denied (Tr. 60).

The defendant testified in his own behalf (Tr. 60). He stated that at the time of the alleged robbery he was coming down Georgia Avenue alone from a pool room; he noticed some boys walking ahead; then noticed the complaining witness running out from behind a tree yelling at a passing car that he had just been robbed; defendant was then about 25 feet from the man (Tr. 61,62); there were three or four men running (Tr. 63). Defendant just stood there. The police stopped and were chasing the men but not catching them came back. Mr. Smitherman (the complaining witness) was standing by the police car; before going straight to him the police saw defendant standing in midways of Howard Place and came over and told him to put his hands up. The police took him over to the tree and searched him. The police chased the men about 60 feet on foot then returned to Smitherman. Appellant had never seen Smitherman or any of the men he saw running before that night. He said he had on a white jacket. (Tr. 64,65).

Defendant on cross-examination testified that he had been convicted in the District of Columbia of unlawful entry on May 16, 1958, and sentenced to sixty days in jail; of

petty larceny on October 26, 1963 and sentenced to ninety days in jail (Tr. 69, 70).

The jury returned a verdict of guilty on both charges (Tr. 109).

Defendant was sentenced to imprisonment for not less than two years or more than six years on Count One and not less than two years or more than six years on Count Two the sentence under Count Two to run concurrently with the sentence imposed under Count One (Tr. 113,114).

STATUTES INVOLVED

Sec. 22-2901 D.C. Code 1961 Ed.

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, sec. 810.)

Sec. 22-503 D.C. Code 1961 Ed.

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, sec. 804.)

STATEMENT OF POINTS

1. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.

2. The trial court erred in not taking action to cure the prejudicial effects of the highly improper and damaging remarks made by Government counsel in the presence of the jury during the recross-examination of the complaining witness.

3. The defendant was unfairly disadvantaged by lack of a transcript of the Government's case at his first trial.

SUMMARY OF ARGUMENT

I

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.

II

The trial court erred in not taking action to cure the prejudicial effects of the highly improper and damaging remarks made by Government counsel in the presence of the jury during the recross-examination of the complaining witness.

III

The defendant was unfairly disadvantaged by lack of a transcript of the Government's case at his first trial.

ARGUMENT

I. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.

This Court has in the past noted errors that had not been objected to before the trial court. (Payton v. U.S., 96 U.S. App. D.C. 1, 222 F 2d 794; Durham v. U.S., 99 U.S. App. D.C. 132, 237 F 2d 760; Bradley v. U.S., 102 U.S. App. D.C. 17, 249 F 2d 922; Schwartz v. U.S., 56 App. D.C. 105; 10 F 2d 900; Meadows v. U.S., 65 App. D.C. 275, 82 F 2d 881; Robertson v. U.S., 84 U.S. App. D.C., 185, 171 F 2d 345. McAfee v. U.S., 70 App.D.C. 142, 105 F 2d 2.

The trial record is comparatively free of error.

It is believed however that there was substantial error committed by the trial court in permitting the statement of Government counsel during the recross-examination of the complaining witness to the effect that the defendant is guilty of the crimes with which he is charged to go unchallenged. A comparison of the transcript of the Government's cases at the first and second trials of defendant does show discrepancies in the testimony of the prosecuting witness at the two trials. Had those discrepancies been called to the attention of the jury at the second trial its verdict may have been otherwise.

This is the first opportunity this counsel has had to bring these matters to the attention of this Court. In

fairness to the defendant inasmuch as these matters would have merited consideration by the trial court they should now be considered by this Court.

II. The trial court erred in not taking action to cure the prejudicial effects of the highly improper and damaging remarks made by government counsel in the presence of the jury during the recross-examination of the complaining witness.

(With respect to Point 2 appellant desires the court to read the last question and the following five lines on page 45 of the transcript and the first line on page 46 thereof.)

During defense counsel's recross-examination of the government witness Smitherman concerning his identification of the face of the man who held the knife to him the prosecuting attorney interrupted counsel and informed the Court and of course the jury who were listening to the testimony - "Your Honor, it is immaterial whether it differs from the other three, even if he were one of the other three, he is guilty of the crimes charged here. * *" (Tr. 45). Inexplicably defense counsel did not object to the remark nor did the trial court sua sponte endeavor to cure the error by a forthwith admonition to the jury or an instruction at the close of all the testimony. As a matter of fact the Court's only response to the remark - "Oh, well, he can ask the question. Go ahead" (Tr. 45,46) - compounded the error.

Counsel's remark was improper and highly prejudicial to the defendant and constituted reversible error (Berger v. U.S., 55 S.Ct. 629, 295 U.S. 78, 70 L ed. 1314; Stewart v. U.S., 101 U.S. App. D.C. 51, 247 F 2d 42).

This Court and the Supreme Court of the United States well recognize as indicated by the decisions in the foregoing cases the gravity of any improper remark made by government counsel because of the great weight given by the general public to governmental pronouncements.

Counsel can find no reported case in which government counsel has made a statement to the effect that the defendant is guilty during the introduction of evidence at a trial. The remarks of government counsel that have merited censure have generally been those made in opening statements or arguments to the jury. Remarks harmful to the defendant made at those times could well be less damaging because contained in a somewhat lengthy address than the one with which we are concerned which was as it were dramatically and unexpectedly made during a portion of the trial when defense counsel as it were "had the floor" and the attention of the jury.

III. The defendant was unfairly disadvantaged by lack of a transcript of the Government's case at his first trial.

(With respect to Point 3 appellant desires the court to read the following pages of the transcript of the first trial held September 28, 1964:- 6, 13, 33, 37, 40; and the following pages of the transcript of the second trial:- 16, 19, 41, 42, 43, 55.

The right of the government to retry the defendant following the failure of the jury to agree upon a verdict at his first trial is not questioned. Green v. U.S., 355 U.S.

184, 78 S.Ct. 221, 2 L ed. 2d 199; Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L ed. 974.

At the second trial however defendant did not have the advantage of a transcript of the case the Government put on at the first trial. Had such transcript been available to him he could have used it to raise before the jury the question of the credibility of the complaining witness for at the second trial the complaining witness changed his testimony with respect to the identification of the defendant as the man who held the knife and the size of the knife.

Former contradictory testimony is admissible for purposes of impeachment and detracts from the weight of later testimony. The Syracuse, 9 Wall 672, 76 U.S. 672, 676, 19 L ed. 783; Neely v. U.S., 79 U.S. App. D.C. 177, 144 F 2d 519 cert. den., 323 U.S. 754, 65 S.Ct.83, 89 L ed. 604.

Stenographic notes taken at former trial are admissible to impeach the testimony of a witness.

Lueders v. U.S., 9 Cir. 210 F 419, 425; Guardian Trust Co. v. Meyer, 8 cir. 19 F 2d 186, 191.

Each change but one in effect wiped out a contradiction that had existed at the first trial between the testimony of the complaining witness Smitherman and that of the other Government witness - Police Officer Waybrite.* That change removed any question as to Smitherman's ability to identify the defendant as the man who held the knife.

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* In the transcript of the first trial the name of this witness is spelled W-a-y-b-r-i-g-h-t.

At the first trial Smitherman testified that the man who held the knife had on a long white coat (1st Trial, Tr.6).

At the first trial the other Government witness - Officer Waybrite - testified the man with the knife had on a khaki raincoat (1st Trial Tr. 40).

At the second trial Smitherman said the man with the knife had on a neutral colored coat (Tr. 41). Waybrite this time said the coat he wore was tan-type (Tr. 55).

At the first trial Smitherman testified that the knife (blade) was "pretty long"; "six or seven inches" (he would estimate) (Tr. 1st Trial, p. 13). He saw only the blade (Tr. 1st Trial p. 13).

At this trial Officer Waybrite said the knife blade was "approximately two and a half, three inches" (Tr. 1st Trial p. 37).

At the second trial Smitherman said the knife blade was "around three inches" (Tr. 16).

At the first trial Smitherman conceded that he had made a statement at the police precinct at the time of the arrest of the defendant that he could not positively identify him as the one who held the knife. (1st Trial, Tr. 33).

At the second trial Smitherman denied emphatically that he had ever said he was not sure about the identity of the man with the knife and testified in no uncertain terms that the defendant was he. (Tr. 19, 42, 43).

The unimpeached testimony of the complaining witness at the second trial was more favorable to the government than had been his testimony at the first trial. Such strengthening of the government's case may well have tipped the scales against the defendant.

CONCLUSION

WHEREFORE it is respectfully submitted that the judgment of the District Court should be revised.

Elizabeth R. Young
715 Southern Building
Washington, D.C. 20005

Attorney for Appellant
(Appointed by the Court)

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Brief was served upon appellee by personal delivery of the same to the United States Attorney's Office, U. S. Court House, Washington, D. C., 20001 on ~~June~~ 28 1965.

Elizabeth R. Young
Attorney for Appellant
(Appointed by the Court)

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BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,094
(Cr. No. 348-64)

JOSEPH L. HAMILTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JEROME NELSON,
Assistant United States Attorneys.

****

QUESTIONS PRESENTED

1. Whether a remark of the prosecutor relating to appellant's possible liability as an accomplice can be regarded as an improper insinuation of guilt and "plain error," where no objection was made, where the court told the jury that if appellant was one of four men in question he would be guilty as an aider and abettor, and where counsel said he had "no question" about that aspect of the case.

2. Whether the conviction should be reversed because appellant had no transcript of his first trial, which ended in a mistrial, where he was represented by the same counsel, who made no motion for a transcript, and where a similar contention was rejected by this Court--even where a motion was made--in Nickens v. United States, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963).

I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,094
(Cr. No. 343-64)

JOSEPH L. HAMILTON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MOTION TO AFFIRM OR DISMISS, OR IN THE ALTERNATIVE, TO TREAT THIS MOTION AS APPELLEE'S BRIEF

Appellee respectfully moves that the instant appeal be dismissed as frivolous or that the judgment of the District Court be summarily affirmed. In the alternative, appellee moves that this motion paper be treated as its brief or, if the preceding motions all be denied, that the requirement of Rule 18(f) be waived and the time for filing appellee's brief be extended for ten days from the entry of the order of denial.

After a jury trial in the District Court appellant was convicted of robbery and assault with a dangerous weapon and was sentenced to two to six years imprisonment on each count, the sentences to run concurrently.

The evidence,- sufficiency of which is not questioned on this appeal - viewed most favorably to the government, showed that appellant held a knife on the victim while three confederates went through his pockets, took some money out of a wallet and took a watch. An officer coming upon the scene by vehicle immediately apprehended appellant, the other three fleeing. Just

prior to appellant's arrest, the four were observed exchanging various items. Neither the knife nor the proceeds of the robbery were found on appellant's person. Both the victim and the officer identified appellant as the man who had held the knife. Appellant, who had prior convictions for unlawful entry and petit larceny, testified in his own behalf, stating that he had merely walked onto the scene and had nothing to do with the offenses, which were perpetrated by those who ran off.

In the course of cross-examination of the victim the following colloquoy occurred:.

> Q. You mentioned you knew his face. Do you recall anything about his face which was different from the face of the other three men?
>
> MR. FREDERICKS: Your Honor, it is immaterial whether it differs from the other three, even if he were one of the other three, he is guilty of the crimes charged here. I don't think the difference between one of of the other three --
>
> THE COURT: Oh, well, he can ask the questions. Go ahead.
>
> THE WITNESS: Well, as I said before, I didn't notice anything distinctive about any of them.
>
> MR. JONES: No further questions.
>
> MR. FREDERICKS: I have nothing further.
>
> THE COURT: You may step down. (TR. 45-46)

It is apparent from the context that the prosecutor was merely arguing to the court that even if appellant had been one of three confederates he would

still be guilty under the normal rules of complicity. Clearly counsel saw nothing improper in the statement and indeed he subsequently told the jury in summation that while the government need not prove that his client held the knife, still the government had to prove that appellant was one of the four men in question (Tr. 84). The court, in the course of instructing the jury, said that if appellant was one of the four men he would be guilty under the doctrine of aiding and abetting and counsel said he had "no question" about that aspect of the case (Tr. 105). Thus the prosecutor said nothing beyond that which was agreed to by all concerned. The prosecutor's statement was in no sense an impermissible reference to a belief in guilt, and was obviously not so regarded by anyone at the trial. This matter illustrates the validity of the rule that courts "must guard against the magnification on appeal of instances which were of little importance in their setting." Glasser v. United States, 315 U.S. 60, 83 (1942).

Finally appellant argues, for the first time on appeal, that he should have been furnished a transcript of his first trial which ended in a mistrial. As to this matter, the case is governed by the decision of this Court in Nickens v. United States, 116 U.S. App. D.C. 338, 341, 323 F.2d 808 (1963) holding that where, as in the case at bar, a defendant has the same counsel in both trials, there is no requirement that he be furnished a transcript of the first. As the Court said in Nickens, alleged inconsistencies in testimony

can be developed by calling the reporter of the prior trial. The instant case is even stronger than Nickens for here there was never any motion for the transcript; moreover, counsel, when asked by the trial judge whether he had a transcript, answered "No, sir. That is the only question I wanted to ask with regard to the former trial." (Tr. 31).

Wherefore, appellee respectfully submits that the motion should be granted.

/s/ DAVID C. ACHESON
DAVID C. ACHESON
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ JEROME NELSON
JEROME NELSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been mailed to attorney for appellant, Elizabeth R. Young, 715 Southern Bldg., 1425 H Street, N.W., Washington, D. C., 20005, this 4th day of June, 1965.

/s/ JEROME NELSON
JEROME NELSON
Assistant United States Attorney